

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH TUCKER, Personal Representative of
the Estate of JAMIE LYNN JENKINS,

UNPUBLISHED
May 5, 2005

Plaintiff-Appellant/Cross-Appellee,

v

No. 251771
Jackson Circuit Court
LC No. 01-003518-NZ

MEIJER, INC., and GLENN MEYERS,

Defendants-Appellees/Cross-
Appellants,

and

WENDY ADAMS, TOM TINKLEPAUGH,
LAURIE JACOBS, JOHN DOE, employees and
agents, and JANE DOE, employees and agents,

Defendants.

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the jury's verdict of no cause of action in favor of defendants, Meijer, Inc., and Glenn Meyers, raising issues related to the trial court's prior decision granting, in part, defendants' motion for summary disposition, and to the trial proceedings. Additionally, defendants have filed a cross-appeal in this case, arguing, in part, that the trial court erred in denying their motion for summary disposition regarding plaintiff's claim of false imprisonment. We affirm the trial court's decision granting defendants' motion for summary disposition of plaintiff's claims of intentional infliction of emotional distress, negligence, and wrongful death; however, we reverse the trial court's order denying defendants' motion for summary disposition of plaintiff's claim of false imprisonment.¹

¹ Although plaintiff seeks a new trial on each of her claims against defendants, none of plaintiff's issues relate to her claim of assault and battery against defendants, upon which the jury returned
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I. Material Facts²

On July 11, 1999, Jamie Jenkins (then fourteen years of age), Jessica Shaw (Jenkins' twelve-year old aunt by marriage), and Karis Tripp (Jenkins' fourteen-year-old best friend) went to Meijer sometime between 11:00 p.m. and midnight. Shaw previously came up with a plan to shoplift from Meijer and took \$150 from her mother, Paulette Tucker,³ without her knowledge, which she split three ways with Jenkins and Tripp. While at Meijer, Shaw encouraged Jenkins to steal something, and they each concealed various items in a purse, and Shaw concealed items in her clothing. Tripp did not steal anything, but used the stolen money to make purchases at Meijer.

When attempting to leave Meijer, the three girls were stopped by Meijer employees, who indicated they had been shoplifting. Jenkins and Shaw were lightly guided by the arm to the security office. Jenkins and Shaw, along with the Meijer personnel, entered the security office at 1:51 a.m. According to Shaw and Tripp, Glenn Meyers, a Meijer employee, "cursed" at the girls after Jenkins and Shaw initially denied shoplifting. Additionally, Shaw was threatened with a strip search, but eventually conceded that she concealed merchandise under her clothing. Tripp was eventually excused because she had not shoplifted. Jenkins and Shaw discussed Cranbrook Academy, a school Jenkins had planned to attend, because a male employee told Jenkins that Cranbrook would see the record of the event and know that she had shoplifted. Jenkins also told Shaw that she was worried about what her mother, plaintiff, would say. At 2:19 a.m., Tripp re-entered the office, and Tucker entered the office for the first time. At 2:58 a.m., Tripp's mother, Gail Tripp, arrived at the security office. Everyone left the security office at 3:03 to 3:04 a.m., except Meyers and Tom Tinklepaugh, another Meijer employee.

Tucker informed Jenkins that she would take care of everything, but Jenkins insisted on telling plaintiff about the incident. Jenkins told Shaw that she could not believe that she had let plaintiff down. The following morning, plaintiff picked Jenkins up from Shaw's house, and plaintiff told Jenkins that she would have to do things around the house to pay for her fine. On the ride home, Jenkins began to cry, and informed plaintiff that she was ashamed of herself because she was in more trouble than ever before. Plaintiff took Jenkins home and told her they would handle the situation when plaintiff returned from work. Jenkins did not provide plaintiff with any details regarding what was said or what had occurred at Meijer.

On July 12, 1999, Jenkins committed suicide using a handgun at approximately 3:30 p.m. Plaintiff's boyfriend last saw Jenkins before he left that day to work out. Although he indicated that Jenkins "seemed down," Jenkins was not crying or noticeably upset. Between 3:00 and 3:30 p.m., Jenkins called her grandmother, Loretta Aiken, telling her she got into trouble and asking her to call her the next morning after 10:00 a.m. because she needed to talk to her. Neither

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a verdict of no cause of action. Accordingly, we limit our review to those issues raised by plaintiff on appeal, and do not address plaintiff's assault and battery claim.

² The facts of this case are not disputed. In that our opinion focuses on defendants' motions for summary disposition, the factual background is derived from deposition testimony.

³ Paulette Tucker was married to Jenkins' biological grandfather.

Aiken, Shaw, nor Tripp had any indication that Jenkins would commit suicide. According to plaintiff, Jenkins did not have counseling or therapy for emotional or mental problems, and she was unaware of Jenkins having any psychological problems or mental illness.

Plaintiff brought suit against defendants alleging in five counts false arrest/false imprisonment (Count I), negligence and gross negligence and/or wanton and willful misconduct (Count II), intentional infliction of emotional distress (Count III), assault and battery (Count IV), and wrongful death (Count V).⁴ Defendants brought a motion for summary disposition, seeking dismissal of each of plaintiff's claims; however, the trial court granted the motion only on the negligence, intentional infliction of emotional distress, and wrongful death claims. Plaintiff subsequently agreed to the dismissal of the false arrest claim, and trial proceeded only upon the claims for false imprisonment and assault and battery. The jury returned a verdict of no cause of action on each of the remaining claims.

II. Standard of Review

Although defendants' motion for summary disposition was brought pursuant to MCR 2.116(C)(8) and (C)(10), the court considered matters outside the pleadings; therefore, we will utilize the (C)(10) standard. This Court reviews the grant or denial of a summary disposition motion de novo. *Allstate Ins Co v JJM*, 254 Mich App 418, 421; 657 NW2d 181 (2002). Pursuant to MCR 2.116(C)(10), summary disposition is appropriate when there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Id.* A genuine issue of material fact exists when the record, viewed in the light most favorable to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. Intentional Infliction of Emotional Distress

Plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition on her claim of intentional infliction of emotional distress. We disagree.

Although our Court has repeatedly recognized the existence of this tort, the Supreme Court has not yet done so. *VanVorous v Burmeister*, 262 Mich App 467, 481; 687 NW2d 132 (2004). In *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004), this Court set forth the following standards relevant to claims of intentional infliction of emotional distress:

To establish a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." The conduct complained of must be "so outrageous in character, and so extreme in

⁴ Plaintiff did not assert as a separate cause of action that defendants violated MCL 764.14.

degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.” It is for the trial court to initially determine whether the defendant’s conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. But where reasonable individuals may differ, it is for the jury to determine if the conduct was so extreme and outrageous as to permit recovery. [Citations omitted.]

Further, “[l]iability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999).

Plaintiff contends that defendants’ actions may reasonably be construed as extreme and outrageous conduct. We find that plaintiff has failed to demonstrate that defendants engaged in extreme and outrageous behavior that would give rise to a cause of action for intentional infliction of emotional distress. As an initial matter, plaintiff requests that this Court review these claims in light of Jenkins’ age at the time of the incident.⁵ Plaintiff has not cited to any case law providing that a higher standard should be applied to claims of intentional infliction of emotional distress involving a fourteen-year-old, and we will not search for it. *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002)

Plaintiff also focuses on four separate areas of alleged misconduct she claims to be outrageous (use of “filthy language,” threat to strip search Shaw, threat that Cranbrook would find out that Jenkins shoplifted, and Meyers’ act of laying his forearm across Jenkins’ chest). We note that with regard to plaintiff’s focus on the language used, liability does not extend to insults or indignities. *Graham, supra* at 674. Nor does liability extend to mere threats. *Id.* at 674. Finally, plaintiff’s claim that it was outrageous for Meyers to lay his arm across Jenkins’ chest does not meet the requirements necessary to demonstrate extreme and outrageous conduct. The deposition testimony revealed that Shaw attempted to pull Jenkins toward her, but that Meyers raised his forearm in front of Jenkins’ chest. Shaw later explained that Meyers’ forearm lightly touched Jenkins’ chest for a few seconds. Such conduct cannot be labeled as extreme and outrageous as a matter of law. Thus, when reviewing all of this evidence in a light most favorable to plaintiff, we cannot say that defendants’ conduct was extreme or outrageous.

IV. Wrongful Death

Plaintiff next argues that the trial court erred in granting defendants’ motion for summary disposition on plaintiff’s claim of wrongful death based upon both the intentional infliction of emotional distress and negligence. We disagree.

⁵ Plaintiff also contends that this Court must consider that defendants violated MCL 764.14 and MCL 600.2953 in connection with this claim. Plaintiff’s argument is that the girls should have been turned over to a peace officer, and that the filing of a police report was necessary. However, it is unclear from plaintiff’s argument how these factors render defendants’ behavior extreme and outrageous.

Plaintiff first contends that defendants may be held liable for Jenkins' death because they intentionally inflicted emotional distress upon her. As previously stated, however, plaintiff failed to present sufficient facts to demonstrate that there was a genuine issue of material fact with respect to her claim of intentional infliction of emotional distress. The trial court therefore properly granted summary disposition in favor of defendants regarding this portion of plaintiff's claim.

Plaintiff next argues that defendants may be held liable for wrongful death based upon their negligent conduct. Under the wrongful death act, Jenkins must be able to maintain an action and recover damages for negligence against defendants. See generally MCL 600.2922(1). In order to demonstrate a claim of negligence, a plaintiff must prove the following four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6 n 6; 615 NW2d 17 (2000).

As a general rule, a plaintiff may not recover damages in negligence for the intentional suicide of another. *Hickey v Zezulka*, 439 Mich 408, 447-448; 487 NW2d 106 (1992) (Riley, J.),⁶ amended 440 Mich 1203 (1992). In *Hickey*, a pretrial detainee committed suicide when he hanged himself with his belt. *Id.* at 415-416. The Court held, "Where a plaintiff intentionally commits an act that brings about an injury, the risk of which was increased by the defendant's negligence, the plaintiff ordinarily loses any cause of action he might have because of defendant's negligence." *Id.* at 448. However, where the defendant assumes a duty to protect the plaintiff from that injury, the plaintiff does not lose his cause of action. *Id.*

In *Graves v Warner Bros*, 253 Mich App 486, 490; 656 NW2d 195 (2002), this Court addressed whether the defendants owed a duty to the plaintiffs' decedent to protect him from harm caused by the criminal acts of a third party. In doing so, we noted that a negligence action may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. *Id.* at 492. Several variables should be reviewed in determining whether a duty exists, including

"foreseeability of the harm, existence of a relationship between the parties involved, degree of certainty of injury, closeness of connection between the conduct and the injury, moral blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach." [*Id.* at 492-493 (citation omitted).]

The Court indicated that, with respect to a merchant (premises owner), the duty is limited to responding reasonably to situations occurring on the premises. *Id.* at 496.

⁶ Three other justices concurred with Justice Riley's opinion, which agreed with the lead opinion, apart from its conclusion that a comparative fault instruction need not be given. *Hickey*, *supra* at 447-450.

In *Johnson v Detroit*, 457 Mich 695, 711; 579 NW2d 895 (1998),⁷ the Court addressed whether the defendants owed a duty to the decedent where the defendants placed him in a defective cell and he committed suicide. Indicating that a defendant does not owe a duty to an unforeseeable plaintiff, the Court held that the plaintiff failed to present a genuine issue of material fact establishing the existence of a duty owed to the decedent because the defendants were actually unaware, and it was not reasonably foreseeable that the decedent was suicidal before placing him in the defective cell. *Id.* Thus, “[w]here the events leading to injury are not foreseeable, there is no duty, and summary disposition is appropriate.” *Id.* The Court concluded, “[T]he defendants had no notice that the decedent might attempt suicide, and therefore they cannot be held responsible for failing to prevent the decedent’s death,” which was not reasonably foreseeable. *Id.*

Here, plaintiff has failed to demonstrate that a genuine issue of material fact exists regarding her claim of negligence/wrongful death. Plaintiff has failed to present any evidence that defendants assumed a duty to protect Jenkins from committing suicide. *Hickey, supra*. Plaintiff, in fact, concedes that there is no duty to an unforeseeable plaintiff, but contends that a duty should be recognized in this case because defendants could have and should have foreseen that “an obviously emotionally fragile 14-year-old girl might be driven to despair, and possibly suicide, by the conduct alleged in this case.” While plaintiff continues to address this issue in terms of causation, plaintiff has failed to present any legal authority for the proposition that a duty, an essential element to a claim of negligence, should be imposed upon defendants. Additionally, plaintiff has failed to address any of the variables, aside from a brief referral to the foreseeability factor, that would impart such a duty on defendants. See *Graves, supra*.

Michigan case law demonstrates that in order to prevail on a claim of negligence, there must be a duty, and the events leading to the injury or the harm itself must be foreseeable in order to impose such a duty. Plaintiff merely alleges that there was a foreseeable potential for injury. Plaintiff presents no evidence that the injury itself (Jenkins’ suicide) was a foreseeable event, or that defendants should have foreseen such. In fact, the evidence presented demonstrated that Jenkins’ own friends and family did not foresee that such an event would take place. Accordingly, the trial court properly granted defendants’ motion for summary disposition with respect to plaintiff’s negligence/wrongful death claim.

V. False Imprisonment⁸

On cross-appeal, defendants argue that the trial court erred in denying their motion for summary disposition⁹ regarding plaintiff’s claim of false imprisonment. We agree.

⁷ Although a plurality opinion, four justices concurred in part III(B) of the lead opinion. *Johnson, supra* at 713.

⁸ Plaintiff indicates in her brief on cross-appeal that her claim of false arrest was dismissed with consent prior to trial. Accordingly, we do not address defendants’ arguments as they relate to that claim. Similarly, because plaintiff did not raise on appeal an issue regarding her claim of assault and battery, we likewise decline to address defendants’ arguments in that respect.

This Court has recently explained the tort of false imprisonment as follows:

False imprisonment, the second half of plaintiff's first count, involves "an unlawful restraint on a person's liberty or freedom of movement." *Peterson Novelties[, Inc v Berkley]*, 259 Mich App 1, 17; 672 NW2d 351 (2003)], citing *Clarke v K mart Corp*, 197 Mich App 541, 546; 495 NW2d 820 (1992). "The elements of false imprisonment are '(1) an act committed with the intention of confining another, (2) the act directly or indirectly results in such confinement, and (3) the person confined is conscious of his confinement.'" *Moore v Detroit*, 252 Mich App 384, 387; 652 NW2d 688 (2002), quoting *Adams v Nat'l Bank of Detroit*, 444 Mich 329, 341; 508 NW2d 464 (1993). The restraint must have occurred without probable cause to support it. *Peterson Novelties*, *supra* at 18. [*Walsh v Taylor*, 263 Mich App 618, 627; 689 NW2d 506 (2004).]

Here, plaintiff does not dispute that defendants had probable cause to arrest Jenkins without a warrant for retail fraud, but argues that even if probable cause existed, plaintiff was not required to prove a lack of probable cause in order to establish her claim for false imprisonment. Michigan case law clearly states that in a claim for false imprisonment the restraint must have occurred without probable cause to support it. *Walsh*, *supra*; *Peterson Novelties*, *supra*. Despite plaintiff's contention that she was not required to demonstrate a lack of probable cause in order to prevail on her claim of false imprisonment, recent Michigan case law clearly rebuts this proposition.

Plaintiff further claims that a plaintiff may recover at least nominal damages for false imprisonment even if the "arrest" was supported by probable cause if the detention and resulting investigation were unlawful or unreasonable pursuant to MCL 600.2917. MCL 600.2917 does not negate the fact that probable cause is necessary in order to prevail on a claim for false imprisonment. Instead, the statute merely provides that a plaintiff may obtain damages against a merchant for a claim of false imprisonment, assault, battery, etc., even if probable cause was shown, for or resulting from mental anguish or punitive, exemplary, or aggravated damages if the plaintiff proves that the merchant or its agent "used unreasonable force, detained the plaintiff an unreasonable length of time, acted with unreasonable disregard of the plaintiff's rights or sensibilities, or acted with intent to injure the plaintiff." MCL 600.2917.

Plaintiff argues that defendants' detention of Jenkins was unprivileged and therefore unlawful because the duration, nature, and scope of the detention and investigation were unreasonable. Because plaintiff concedes that probable cause existed in this case, plaintiff must demonstrate that defendants used unreasonable force, detained Jenkins for an unreasonable

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⁹ Although defendants have framed this issue in terms of its motion for directed verdict and plaintiff does not contest defendants' standard of review, this issue, as raised below, does not relate to the arguments made during defendants' motion for directed verdict. However, this issue was raised before and considered by the lower court in one of defendants' motions for summary disposition, and defendants recognize in their brief on cross-appeal that the argument does relate to their motion for summary disposition. Accordingly, we review this issue under the de novo standard applicable to motions for summary disposition.

length of time, acted with unreasonable disregard of Jenkins' rights or sensibilities, or acted with intent to injure Jenkins. MCL 600.2917. Plaintiff first argues that Jenkins was subjected to unreasonable force because Meyers escorted her by the arm to the security office and because he touched Jenkins by laying his arm across her chest. Such conduct cannot be deemed an unreasonable use of force. Meyers lightly escorted Jenkins, and briefly touched her chest with his forearm. Thus, plaintiff has failed to demonstrate a genuine issue of material fact exists with respect to her claim that unreasonable force was used.

Plaintiff further contends that defendants may be held liable because the girls were addressed with "filthy language" in loud, abusive tones, Shaw was threatened with a strip search in Jenkins' presence, and Jenkins was informed that Cranbrook would see the record of the event. Plaintiff does not identify how this evidence meets one of the exceptions to the merchant liability statute; however, it may be inferred from plaintiff's argument that this evidence demonstrates that defendants acted with an intent to injure. Again, such evidence does not create a genuine issue of material fact because the conduct was not of such a nature that it would in fact injure a person. Indeed, as previously stated, such conduct does not even amount to an intentional infliction of emotional distress.

Finally, plaintiff argues that the length of the detention was unreasonable because defendants should have contacted the police and should have contacted plaintiff on Jenkins' behalf. Plaintiff also asserts that it was inappropriate to detain the girls for the purpose of preparing defendants' demands for damages. Here, the entire detention lasted from 1:51 a.m. through 3:04 a.m. However, Paulette Tucker arrived at 2:19 a.m. to be with the girls, and Gail Tripp, Karis Tripp's mother, arrived at 2:58 a.m. The girls were detained without a parent for a mere twenty-eight minutes. Thus, the evidence demonstrates that the detention was brief. Additionally, plaintiff has presented no evidence to demonstrate that this was an unreasonable length of time. Accordingly, plaintiff has failed to present sufficient evidence to create a genuine issue of material fact that the length of detention was unreasonable. In conclusion, plaintiff failed to present sufficient evidence to demonstrate that any of the exceptions to MCL 600.2917 apply in this case to render defendants liable under the statute.¹⁰

¹⁰Even though not necessary to our resolution of this case, we also find that the trial court erred in failing to apply the wrongful conduct rule to this case. The wrongful-conduct rule provides that a plaintiff cannot maintain an action if, "in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party." *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995). "[A]s between parties in pari delicto, that is equally in the wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them." *Id.* Additionally, there must also be a sufficient causal nexus between the plaintiff's illegal conduct and the plaintiff's asserted damages. *Id.* at 564. Jenkins' conduct most certainly led to defendants' detention for the shoplifting offense by defendants, as it applies to the false imprisonment claim (plaintiff must demonstrate a lack of probable cause or that one of the statutory exceptions applies). Thus, a causal connection exists between Jenkins' conduct and her claim of false imprisonment. Further, it is not apparent that defendants' alleged misconduct does, in fact, outweigh Jenkins' misconduct. At best, considering the testimony that Meyers used profanities toward the girls and
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VI. Conclusion

In that none of plaintiff's issues on appeal relates to her claim of assault and battery, there are no remaining claims to be addressed given our disposition of this case. We decline to address the remaining issues raised in plaintiff's brief on appeal and in defendants' brief on cross-appeal relating to issues relevant to a new trial, because they are unnecessary to the resolution of this case.

Affirmed in apart, reversed in part, and remanded for entry of an order granting defendants' motion for summary disposition of plaintiff's false imprisonment claim. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Peter D. O'Connell

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placed his arm up to block Jenkins, we may reasonably consider the parties to be equally culpable. However, when both parties are equally in the wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them. *MCA Financial Corp v Grant Thornton, LLP*, 263 Mich App 152, 156; 687 NW2d 850 (2004), quoting *Orzel*, *supra* at 558.